No. 651

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

MELDON MITCHELL, *Petitioner*,

v.

THE FLINTKOTE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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THE FLINTKOTE COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Meldon Mitchell prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above-entitled case on January 4, 1951.

OPINION BELOW.

The trial court's charge to the jury (R. 248-255) is not reported. It wrote no opinion. The opinion of the Court of Appeals for the Second Circuit (R. 418-23) is reported at 185 F. 2d 1008.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was entered on January 4, 1951 (R. 423-4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND EXECUTIVE ORDERS INVOLVED.

Executive Order No. 9001, and the relevant provisions of Executive Order No. 10211, the Armed Services Procurement Act of 1947, the Federal Property and Administrative Services Act of 1949, and the other statutes involved, are set forth in the Appendix, pp. 27-36, *infra*.

QUESTIONS PRESENTED.

(1) Whether Executive Order No. 9001 states a public policy against the enforceability, between the parties, of contracts providing for contingent compensation for obtaining or securing Government contracts, though nothing improper or detrimental to the public interest was done or contemplated pursuant to the contingent fee contract.

(2) Whether a contract for contingent compensation for obtaining Government contracts is enforceable between the parties where it appears that the parties to the contract for contingent compensation did and contemplated doing nothing improper or detrimental to the public interest pursuant to their contract.[1]

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[1] Petitioner reserves the right, if certiorari is granted, to argue that the contingent fee contract in question was not one to obtain or secure Government contracts, but rather generally to promote the sale of certain products to the Government through consultation with the Government on technical matters, and to argue other questions raised by the case.

STATEMENT.

This is a diversity suit for breach of contract brought by the petitioner, a citizen of New York, against the Flintkote Company, a Massachusetts corporation.

The complaint, dated August 29, 1947, alleged a contract made in January 1942 by which petitioner agreed to continue working, as he had done theretofore, to cooperate with defendant Flintkote to develop and utilize defendant's products for purposes of military camouflage and to promote the sale of such products to agencies of the federal Government for the purposes of military camouflage. In return defendant agreed to pay petitioner 3 per cent of its sales to Government agencies of materials for purposes of camouflage. It was further alleged that the petitioner had performed his contract but that defendant had not, though since January 2, 1942 it had made sales of such materials in an amount alleged upon information and belief to be in excess of $5,000,000 (R. 2-5). The answer made what was in substance a general denial and pleaded that the contract alleged was illegal and void as contrary to public policy (R. 6-8).

The case was tried before the Hon. John W. Clancy, D. J., and a jury. There was the following testimony to support the verdict of the jury for petitioner.

Petitioner is an industrial designer, trained at an engineering school and in universities and schools in art and design (R. 20-21). He is an expert in the field of military camouflage, with experience dating back to World War I, when he commanded the Marine Corps' school of camouflage, with the rank of gunnery sergeant (R. 21-28, 103). Between the wars and in World War II, he wrote, lectured and worked with the Army, Navy and Marine officers in the field of camouflage (R. 23-

27). He received no compensation from the Government for this work and at the end of World War II he was cited by the War Department for his contributions to military camouflage (R. 28, Pltff's exh. 1, R. 258).

Defendant manufactures building materials and paint, including paint suitable for camouflage purposes (R. 35, 156, 196). Petitioner first came to defendant in November 1940, as a result of of his work with the Army, in pursuit of a manufacturer capable of making newly devised camouflage materials and of adjusting existing production to the camouflage needs of the War Department (R. 28-30, 36). Between that time and our entry into the war, he acted as an uncompensated intermediary between defendant and the military authorities and had frequent discussions with both on camouflage and on defendant's capacities to produce camouflage materials (R. 31-52, Pltf's Exh. 2-6, 8-11, R. 259-63, 269-74). In April of 1941, petitioner proposed a contract to defendant, but defendant thought it premature (R. 47-8, Pltff's Exh. 7, R. 264-8).

Petitioner testified that on our entry into the war he visited Washington to discuss the military camouflage program. On his return, he discussed the matter on January 5, 1942, over the telephone, with defendant's vice-president, Neher, and raised again the question of a contract. He testified that he then reached an agreement with Neher to give defendant part of his time to cooperate with the Government and defendant in camouflage matters and in bringing defendant to the attention of Government camouflage officers as a source of materials, in return for three per cent on all defendant's sales of camouflage materials to the Government during the war (R. 52-57, 104-6). Petitioner's testimony as to the agreement was contradicted by Neher.

Neher, who had previously denied any agreement, admitted on the stand that an agreement had been reached, though different from petitioner's version. Aside from such matters as demeanor on the stand, his changing testimony as to the agreement, on questioning by counsel and by the court, and on other matters, was such that the jury could have found him not to be a credible witness (R. 163-6, 170-1, 178-80, 182-3, 185, 188-94, 218-29, 240-6, Pltff's Exh. 12-13, R. 275-6, R. 73-6).

The petitioner testified to his activities in the performance of the contract. He reported developments in Washington to defendant, discussed technical problems and new products needed for camouflage, procured samples for submission to the authorities, and visited the Army, Navy, Marines, and Civil Defense camouflage officers in Washington to bring to their attention defendant's capacities to produce camouflage materials (R. 57-67, 72-3). Col. R. P. Breckenridge, who organized the camouflage section at the Army Engineer Board, Ft. Belvoir, in January 1941 and continued in charge until about June 1942, testified in corroboration. He testified to the meetings with petitioner and, at petitioner's suggestion, with defendant, and to continued discussions and correspondence with petitioner on varied camouflage subjects and on defendant's capacity to produce camouflage materials (R. 77-93). He testified that petitioner repeatedly recommended defendant as a source of camouflage materials (R. 80-1, 88-9, 92-3). Neher testified that the Army Engineer Board had designated defendant as an approved source of camouflage paint (R. 190-1).

With respect to the nature and propriety of petitioner's services, it appeared from both petitioner's and Neher's testimony that petitioner was not a sales-

man but a technician and that defendant had at least one other representative located in Washington, whose function it was to make contacts (R. 41, 55-6, 62-3, 103, 168, 170-6, 179-80, 182-3, 185, 187, 237). Petitioner testified that the men he saw in the course of furthering defendant's interests had no power to buy the products which petitioner represented (R. 146). His access to such officers was on the basis of common knowledge of the profession of camouflage (R. 107-8). Both Col. Breckenridge and the petitioner testified that the petitioner made frequent disclosure of his representation of defendant (R. 38-40, 80, 88-9, 93). Col. Breckenridge testified that petitioner had "very definitely" cooperated with respect to the development of camouflage materials and that "some of his ideas were extremely good and others were like the ideas of many of us, not so practical" (R. 79, 92). Col. Breckenridge testified further that the Army Engineer Board had no procurement authority or functions; that it investigated and tested the usability of materials for camouflage purposes and prepared specifications for such materials for use by procurement officers elsewhere in the Government. Customarily, too, the Board made recommendations, for the use of procurement officers, of available sources for these materials and its policy was to designate among the sources those who had assisted in the development or were in a position to supply the material (R. 85-8, 91-2, 100-2). Neher testified that defendant's contracts for the sale of camouflage paint to the Government were in every case based upon public advertisement and competitive bidding (R. 191, 216, 227). There was no testimony as to the terms of defendant's contracts with the Government and as to whether the contracts contained a warranty against contingent fees for obtaining the contract.

Defendant supplied the amounts of its sales of camouflage paint to the Government, between January 2, 1942 and August 16, 1945, the conclusion of hostilities (R. 158-60, 191, Pltff's Exh. 14, 15, R. 277-82). It is not disputed that the sum due petitioner, if the contract was made and performed and is enforceable under public policy, is $19,832 (R. 253).

Defendant made no objection to the charge to the jury (R. 248-55), with one exception. Judge Clancy refused a request of the defendant to charge that "Contracts of employment, the performance of which involve the procurement of public contracts, are against public policy and unenforceable if the compensation to be received by the person so employed is contingent upon his success in procuring such contracts. It makes no difference in this regard that the services rendered were legitimate and involved no wrongdoing on the part of plaintiff . . ." (R. 248, 255, 257). Defendant took an exception to the refusal to give this charge and made motions for a directed verdict and to set aside the verdict, grounded on the view of the law in the requested charge. These motions were denied (R. 195, 256).

The jury returned a verdict for petitioner for $19,832 and judgment was entered, with interest allowed by the court (R. 256-7, 411). On appeal, the Court of Appeals for the Second Circuit (Circuit Judges Swan, L. Hand, Frank) reversed and dismissed the complaint (R. 418-23). The Court of Appeals held that paragraph 5, Title II of Executive Order No. 9001 (Appendix, p. 27, *infra*) states a public policy against the enforceability, between the private parties, of contingent fee contracts for obtaining contracts with the federal Government, without regard to whether anything sinister or improper was done or con-

templated pursuant to the contract (R. 420-421). The court further held that the public policy is applicable though defendant's contracts with the Government resulted from competitive bidding (R. 420); that it is immaterial that there was no showing that the contracts with the Government contained such a warranty against contingent fee contracts as is specified by the Executive Order (R. 420); and that petitioner's contract with defendant was one to secure Government contracts (R. 421). This petition for certiorari followed.

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

(1) In holding that Executive Order No. 9001 creates a rule of public policy against the enforceability of contracts for contingent compensation for soliciting or obtaining contracts with the federal Government, without regard to whether anything sinister or improper was done or contemplated pursuant to the contract.

(2) In failing to hold that such contingent fee contracts are enforceable unless it appears that the parties did or intended to do improper or corrupt acts pursuant to the contract.

(3) In failing to hold that the contract between petitioner and defendant Flintkote was enforceable.

(4) In failing to hold that petitioner and defendant Flintkote Company did or intended to do nothing improper or corrupt pursuant to the contract between them.

(5) In holding that the contract between petitioner and Flintkote Company was one to solicit or secure Government contracts.

(6) In failing to hold that the evidence was sufficient to support the verdict of the jury for petitioner.

(7) In reversing the judgment and in dismissing the complaint.

REASONS FOR GRANTING THE WRIT.

(1) The Court of Appeals seems to have started from the correct premise that under this Court's decisions as they stood prior to Executive Order No. 9001, the contract between petitioner and Flintkote, though regarded as one to secure a contract with the Government, was enforceable between the parties if there were no evidence of improper acts done or contemplated to be done pursuant to the contract (R. 421-2). *Steele* v. *Drummond,* 275 U. S. 199; *Valdes* v. *Larrinaga,* 233 U. S. 705; *Oscanyan* v. *Arms Co.,* 103 U. S. 261. Cf. *Winton* v. *Amos,* 255 U. S. 373, 392-3; *Stanton* v. *Embrey, Administrator,* 93 U. S. 548, 556. See *Coyne* v. *Superior Incinerator Co. of Texas,* 80 F. 2d 844 (C. A. 2); 6 Williston, *Contracts* (Rev. Ed.) Sec. 1729A. It departed from this rule and refused to look at the evidence, under its holding that paragraph 5 of Title II of Executive Order No. 9001 stated a "rigorous" federal public policy against the enforceability of contingent fee contracts, without exception (R. 421-2).[2]

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[2] The Court of Appeals intimated (R. 421) that the "older" Supreme Court cases refused to enforce such contracts without regard to the evidence of impropriety. But these older cases have been distinguished by this Court itself as invariably based on facts showing that improper or corrupt acts were done or intended to be done. *Steele* v. *Drummond,* 275 U.S. 199, 206. It is interesting to note that Mr. Justice Holmes' opinion in *Hazelton* v. *Sheckells,* 202 U.S. 71, is most often cited, and was cited by the court below (R. 421) for its language condemning such contracts without regard to the evidence of impropriety. Yet it was Mr. Justice Holmes

Executive Order No. 9001 (Appendix, p. 27 *infra*), promulgated on December 27, 1941, pursuant to authority granted by the First War Powers Act, 1941, authorized the agencies of the Government[3] to enter into contracts without regard to the provisions of law relating to Government contracts. Title II of the Order consists of regulations for the exercise of the authority granted. Paragraph 5 of Title II provides:

> Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this war-

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who seven years later wrote, again for a unanimous court, matter-of-factly enforcing such a contract and distinguishing *Hazelton* v. *Sheckells*, because the Court could "discover nothing in the language of the letters [embodying the contract] that necessarily imports, or even persuasively suggests any improper intent or dangerous tendency." *Valdes* v. *Larrinaga*, 233 U.S. 705. 709. In *American Seating Co.* v. *Zell*, 322 U.S. 709, the *per curiam* opinion states that three judges were of the opinion that the contract, one for a contingent fee, was against public policy and void, citing *Hazelton* v. *Sheckells* and Executive Order No. 9001. The opinion of the three judges is no doubt attributable to the showing in the record in the *Zell* case that the object of the contract was the improper sale of influence and that the parties, conscious of the impropriety, kept their agreement a secret. No. 613, Oct. Term, 1943, R. 6-7, 22-24.

[3] At the outset Executive Order No. 9001 applied only to the War and Navy Departments and the Maritime Commission, but it was extended to substantially every agency of the Government. The several Executive Orders extending Executive Order No. 9001 are set out at 50 U.S.C. App. § 611 ff.

> ranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

The Court below held that this provision "flatly requires" that no one be employed to solicit Government contracts. "No exception is made for cases in which nothing sinister was contemplated or done under the terms of the contingent fee contract" (R. 421). Accordingly, it concluded, in effect, that paragraph 5 required it to presume detriment to the public interest, contrary to the express injunction of this Court in *Steele* v. *Drummond,* 275 U. S. 199 at 205.

This holding illustrates the evil of ignoring this Court's frequent warnings against judicial creation of a public policy interfering with freedom of contract on the basis of any but unequivocal expressions of Congressional intent. *Muschany* v. *United States,* 324 U. S. 49, 65-67; *Steele* v. *Drummond, supra; Twin City Co.* v. *Harding Glass Co.,* 283 U. S. 353, 356-7; *United States* v. *Bethlehem Steel Corp.,* 315 U. S. 289, 308-9, dissenting opinion of Frankfurter, J., 312 at 334; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 597. For paragraph 5 of Title II of Executive Order No. 9001 is a weakling source for an uncompromising public policy outlawing all contingent fee contracts.

(a) First, the Executive Order shows no awareness that it states a public policy against the enforceability of contracts for a contingent fee for securing a Government contract. Title I contains a preamble which is no doubt a statement of public policy, but the subject matter is far loftier than contingent fee contracts. Title II sets out regulations for implementing the authority granted in Title I to let contracts without regard to governing provisions of law. Paragraph 5 of Title II requires that a specified warranty against contingent fees appear in contracts entered into pursuant to the Order. The warranty not only contains an exception, but it states the sanctions for contracts which offend it—deduction of the fee from the contract price or annulment of the contract. The additional sanction of unenforceability as between the private parties should not be supplied by the courts, without some strong showing. *Frost & Co.* v. *Mines Corp.*, 312 U. S. 38. The state courts have so held, in cases involving the Executive Order. *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. 2d 892, 895 (Sup. Ct. Mo.); *Bradford* v. *Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N. Y. S. 2d 448 (Sup. Ct.); *Singer* v. *Bruner-Ritter, Inc.*, 180 Misc. 928, 42 N. Y. S. 2d 881, aff'd 266 App. Div. 953, 44 N. Y. S. 2d 589, app. den. 266 App. Div. 993, 45 N. Y. S. 2d 411 (1st Dept.).

(b) Second, paragraph 5 is hardly a new departure warranting a change in the law developed by this Court. The paragraph merely restates an administrative practice of many years standing. A similar warranty was first used by the Government in 1918, after the matter went to President Wilson for his personal decision. A clause identical with that required by paragraph 5 has been in the standard form for Government construction contracts since 1923 and in the form for supply

contracts since 1927. See the historical memorandum by Robert E. Kline, Special Assistant to the Undersecretary of the Navy, Hearings before the House Naval Affairs Committee pursuant to H. Res. 162, July 16, 1942, 77th Cong., 2nd Sess., pp. 1185-1190. It is clear from the history and purpose of the warranty that it has never been intended to change the public policy as expressed in this Court's opinions or to outlaw such contracts without regard to the facts. In the course of formulating an exception to the warranty (the predecessor of the exception presently in Executive Order 9001), President Wilson put it that the "single object" of the Government in requiring the warranty "was to prevent the contingent fee based upon no real service whatsoever" and to exclude those "who may seek to trade upon their supposed influence." *Ibid,* p. 1188. That purpose has not changed to this very day, as will appear.

(c) Third, the administrative agencies charged with the enforcement of the warranty in paragraph 5 have uniformly held that whether a given contingent fee contract violates the warranty clause is a matter to be determined on all the facts and circumstances, such as whether personal influence or legitimate services were intended, the scope of the agent's employment, and the contribution of the agent to the war effort. *North American Iron & Steel Co. Inc.* v. *Navy Department,* 1 Appeal Bd., Office of Contract Settlement, No. 116, Feb. 7, 1947, 4 CCF ¶ 60,238; *Alloy Products Corporation,* Army Board of Contract Appeals, No. T-1571, Div. No. 1, Oct. 1, 1947, 4 CCF ¶ 60,389; Op. No. B-26993, 22 Comp. Gen. 124.

These administrative agencies approve contingent fee contracts on looking to the purpose, rather than the

words, of the exception in the warranty in favor of contracts with "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business." For instance, the Judge Advocate General has ruled generally that contingent fee contracts are permissible if made with "a bona fide agent." See *Reynolds* v. *Goodwin-Hill Corporation,* 154 F. 2d 553, 555, M. 2 (C. A. 2). And the Comptroller General, approving a contingent fee contract with a real estate broker,[4] relied upon the exception in paragraph 5 to show that "in some instances dealing with agents or contractors is not objectionable and, in fact, may be desirable from a Government standpoint. . . . Apparently, it is not the purpose of the provision of the Executive Order . . . to interfere with the ordinary trade practices of persons desiring to contract with the Government." Op. No. B-26993, 22 Comp. Gen. 124, 126. Government counsel have taken this position. In *United States* v. *Buckley,* 49 F. Supp. 993, 995 (D. C. D. C.), Chief Judge Laws noted that "the prosecution frankly has conceded there is question as to the meaning of the words 'maintained by the contractor,' in the President's order, and that reason would seem to compel the view that the contractor would not offend the order simply because he occasionally employed a broker to obtain a contract."

This view has prevailed until this writing. The administrative officers who are today passing on these contingent fee contracts continue to use this standard. On March 14, 1951, Rear Admiral M. L. Ring, Mili-

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[4] A real estate broker is perhaps the type of agent who could least be said to be "maintained" by his principal. Certainly he is no more "maintained" by the contractor than petitioner was maintained by Flintkote.

tary Director for Procurement, Munitions Board, testified as follows before a Congressional committee (Hearing before the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, March 14, 1951, p. 4359):

> Each case must, of course, be decided on its own merits since a relationship may be proper at one time but improper another. In passing on each case we try to establish who is a bona fide employee or a bona fide established commercial or selling agency and who is not.[5] It must be remembered that it is general business practice in certain segments of industry to employ representatives while in others it is not. Also, big business can afford a full-time Washington representative—small business cannot.
>
> The decisions in some cases are not easy since there are no categorical guideposts set up whereby we can judge whether or not the warranty of the contingent fee clause has been breached as each case must be decided on its own particular facts. How-

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[5] The warranty clause currently in use is that specified in Part 1(10) of Executive Order No. 10211 of February 2, 1951, in Section 4(a) of the Armed Services Procurement Act of 1947, and in Section 304(a) of the Federal Property and Administrative Services Act of 1949. It differs from the warranty prescribed in Executive Order No. 9001 only in excepting contracts with a "bona fide employee" in addition to those with "bona fide established commercial or selling agencies maintained by the contractor." (Appendix, pp. 31, 33, 34, *infra.*)

It is plain from the testimony at the hearings quoted from in the text that the Government does not understand the restatement of the warranty in the two new statutes and in the new Executive Order to mark a change in the public policy or even the administrative practice with respect to contingent fee contracts.

ever, it is not too difficult as long as the real intention of the Congress—the elimination of the influence peddler—is kept in mind.

This statement of the administrative standard is essentially that laid down by President Wilson and by this Court—of striking down only the contingent fee contract which does not spring from normal, legitimate business, but whose purpose or performance involves something sinister or improper, detrimental to the public interest. This has been the holding (in conflict with that of the court below) of the several state courts which have passed on the effect of paragraph 5 of Title II of Executive Order No. 9001. *Glass* v. *Swimaster Corp.*, 74 N. D. 282, 21 N. W. 2d 468; *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. 2d 892; *Leahy* v. *Brooklyn Waterfront Terminal Corp.*, 272 App. Div. 781, 69 N. Y. S. 2d 596 (2d Dept.). Cf *Hall* v. *Anderson*, 18 Wash. 2d 625, 140 P. 2d 266; *Weinstein* v. *Palmer*, 226 Minn. 64, 32 N. W. 2d 154; *United States* v. *Buckley*, 49 F. Supp. 993 (D. C. D. C.).[6]

(d) Fourth, it is affirmatively demonstrable that Executive Order No. 9001 does not state an uncompromising public policy against the enforceability of contingent fee contracts. The Congress has since unmistakeably stated that it does not desire that these contracts be illegal or unenforceable without regard to the facts.

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[6] The court below has in two cases suggested that Executive Order 9001 states a public policy against enforcement of a contingent fee contract made to procure a single, specific contract. *Bradley* v. *American Radiator & Standard San. Corp.*, 6 F. R. D. 37 (S.D.N.Y.), aff'd. 159 F. 2d 39 (C.A. 2); *Reynolds* v. *Goodwin-Hill Corp.*, 154 F. 2d 553 (C.A. 2).

A hint that Congress intended to speak on the subject appears in the legislative history of Title II of the hurriedly passed First War Powers Act, 1941 (55 Stat. 839), pursuant to which Executive Order No. 9001 was issued. 87 C. R. 9865, 77th Cong., 1st Sess.[7] In the next session, beginning in January 1942, hearings were held and public attention paid to the subject of contingent fee contracts. Shortly thereafter the House passed H. R. 7304, which explicitly made such contracts unlawful and "invalid and unenforceable." H. R. 7304, set out at 88 C. R. 6411, 77th Cong., 2nd Sess.[8]; H. Rep. No. 2356. 77th Cong., 2nd Sess.; Hearings before the House Committee on Naval Affairs pursuant to H. Res. 162, May 29, 1942, July 15 and 16, 1942, 77th Cong., 2nd Sess.; Hearing before the House Committee on Naval Affairs on H. R. 7304, July 17, 1942; 88 C. R. 5589, 6409-20, 6423, 6426, 77th Cong., 2nd Sess.

Had it been enacted, H. R. 7304 would of course have stated the rigorous and uncompromising public policy which the Court of Appeals believed was to be found in Executive Order No. 9001. But the Senate Committee on Naval Affairs deliberately rejected the bill,

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[7] Mr. Kefauver, a member of the committee reporting the bill which became the First War Powers Act, said (87 C.R. 9865):

> As to the section that deals with contracts, we considered trying to write into this section a provision protecting the Government from fraud and extortion by so-called contract brokers. However, this subject should be covered by comprehensive legislation and I hope it will be appropriately taken care of at an early date.

[8] The bill applied only to naval contracts but it was amended on the floor to apply to all Government contracts. 88 C.R. 6412.

impressed with the argument that it would harm small business and retard its war production.[9]

Thus we have a deliberate refusal by the Senate to legislate that such contracts be unenforceable. Any remaining doubt of the Congressional intention that such contracts remain enforceable was dissipated when on July 14, 1943 the Congress enacted, as a stated substitute for H. R. 7304, Public Law 149, which was designed only to limit the profits from contingent fee con-

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[9] The Senate Committee later said (S. Rep. 255, 78th Cong., 1st Sess., p. 1):

> On July 20, 1942, the House of Representatives passed H.R. 7304, a bill prohibiting the payment of contingent fees for services in connection with the procurement of Government contracts. This bill was referred to the Senate Committee on Naval Affairs. Many letters were received by the committee from trade associations, chambers of commerce, and reputable businessmen, protesting enactment of this bill. The gist of their complaints were as follows: It would change the entire sales structure of the country and render it impossible for many manufacturers to function efficiently; it would work against the small- or medium-sized manufacturer and in favor of large corporations; and would delay the production effort of thousands of small manufacturers and thereby retard the war effort. A substitute bill was drafted which did not seek to prohibit the payment of contingent fees, but provided that if fees or commissions were found to be unreasonably high the amounts determined to be unreasonable should be deducted from the amounts payable under the Government contracts. The War Department, the Navy Department, and the House Naval Affairs Committee would not accept the proposed substitute, and H.R. 7304 was not enacted.

A similar statement of the reasons for the failure of H.R. 7304 was made by Mr. Vinson, Chairman of the House Committee on Naval Affairs, 89 C.R. 3626, 78th Cong., 1st Sess.

tracts.[10] Throughout the legislative history of Public Law 149 it was repeatedly emphasized that the bill did not outlaw such contracts, but was merely intended to limit the resulting profits.[11] There was even the sig-

[10] P.L. 149, 78th Cong., 1st Sess., 57 Stat. 564 (Appendix, p. 35, *infra*), as amended, 50 U.S.C. App. § 1191(a)(5). The bill amended the Renegotiation Act of 1942 by defining subcontracts, for the purpose of renegotiation, to include contracts under which any amount payable is contingent upon the procurement of a contract with the Government or under which any part of the services to be performed consists of soliciting or procuring a contract with the Government. A proviso states that the section is not to be construed "to affect in any way the validity or construction of provisions in any contract" with the Government "prohibiting the payment of contingent fees or commissions."

[11] H. Rep. 353, 78th Cong., 1st Sess., p. 3; S. Rep. 255, 78th Cong., 1st Sess., p. 2 (the bill "does not prohibit the payment of a contingent fee or commission").

In the course of the debates in the House, Mr. Vinson, chairman of the committee which had reported the bill, said:

> It must be remembered that this bill does not outlaw the payment of contingent fees or commissions. The legitimate agent, who is content with a reasonable fee, and who is willing to carry his fair share of the war effort without being made a millionaire, has nothing to fear from it. It is only the war profiteer, the man who is only willing to play his part on the home front if there are exorbitant profits in it for him, who will balk at this bill. All that is proposed is to provide the Departments with authority to keep these profits within reasonable bounds. (89 C.R. 3627)
>
> There is nothing in this bill that prohibits any broker or manufacturer's agent approaching any department of the Government and offering to do business with them. We simply say, "If you do that, and your total income from Government business is more than $25,000 for a fiscal year, you are classified as a sub-contractor, and we have a right, under this bill, to renegotiate and to pay you that sum of money which we think your services justify you to receive. (*Ibid*, p. 3628)

See generally 89 C.R. 3625-9 (Mr. Vinson); 4646, 5863 (Senator Walsh).

nificant admission that the selling agents who had benefited from such contingent fee contracts had performed services of value in introducing Government procurement officers to the capacities of industry and in aiding the conversion of business to wartime production. H. Rep. 353, 78th Cong., 1st Sess., p. 3,[12] S. Rep. 255, 78th Cong., 1st Sess., pp. 2-3; 89 C. R. 3627.

This refusal to legislate, coupled with the later legislation, constitutes a plain Congressional recognition of contingent fee contracts and removes all basis for the ruling below that Executive Order No. 9001 states an inflexible public policy against the enforcement of contingent fee contracts. *Muschany* v. *United States,* 324 U. S. 49. In *Muschany* the Court concluded that any doubts as to the public policy against the commission arrangement there in question were dissipated when a limitation on such commissions was eliminated from an appropriation bill and when Congress, in still later legislation, recognized commission contracts as appropriate in certain circumstances. 324 U. S. at p. 68. In note 21 to the Court's opinion (*ibid.*), there is a reference to Executive Order No. 9001. The implication, clearly, is that paragraph 5, Title II of Execu-

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[12] At p. 3 of its report, the House Committee said:

> It cannot be said that these agents' services were entirely without value. Generally speaking, they were useful in bringing Government and business together, and sometimes they have assisted in adapting peacetime enterprises to war production. There is nothing in the proposed legislation which would prevent small manufacturers from availing themselves of the services of representatives of this character. It is recognized that many of them cannot afford to have a direct representative in Washington, and there is an advantage in being able to share the expense with other manufacturers.

tive Order 9001 is an additional recognition of the legitimacy of commission contracts.

The Congressional view evidenced in the refusal to enact H. R. 7304 and in the enactment of P. L. 149 is unchanged, to the present. As recently as last year and again last month, the Senate Subcommittee charged with the problem and the Government officers who appeared before it, took pains to reaffirm the difference between the legitimate representative of business, who performs a service both for his client and the Government, and the "influence peddler" who has nothing to offer but inaction, impropriety and corruption. *The 5-Percenter Investigation,* S. Rep. 1232, 81st Cong., 2d Sess., pp. 2-6.[13]; Hearing before the Senate Investigations Subcommittee, Committee on Expenditures in the Executive Departments, March 14, 1951, pp. 4274, 4313 (Senator Hoey, Chairman); 4276-80 (General Services Administrator Jess Larson); 4323 (H. K. Clark, Exec. Vice Chairman, Munitions Board); 4359 (Rear Admiral Ring, Military Director for Procurement, Munitions Board).

(2) Once the Executive Order is removed as an inflexible bar to enforcement of all contingent fee con-

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[13] At page 3 of its report, the Subcommittee said:

> While the subcommittee condemns the employment of persons who seek to obtain business by influence or other improper methods, it recognizes the need in certain cases for the employment of accredited sales representatives or manufacturers agents who properly represent their clients in the field of Government procurement.
>
> Whether a relationship between the company and its representatives is a bona fide one or not, in the final analysis, can be determined only by knowing whether it was so conceived in the minds of the parties involved.

tracts, there is no doubt but that petitioner's contract comes well within the rule of this Court enforcing such contracts. *Steele* v. *Drummond,* 275 U. S. 199; *Valdes* v. *Larrinaga,* 233 U. S. 705. For there is no evidence or even suggestion that petitioner did or intended to do improper acts in the course of his association with the military officers on behalf of defendant Flintkote. Quite the contrary. Both petitioner and the military men with whom he dealt had nothing to do with procurement (R. 85-8, 91-2, 100-2, 146). Petitioner made full disclosure of his representation of commercial interests (R. 38-40, 80, 88-9, 93). His association with the military camouflage officers was as a technician, working with his fellows in the Government on the merits of problems of camouflage, and pointing out his client's capacity to supply the needed materials (R. 80-1, 88-9, 92-3, 107-8). Petitioner's actions were "intended to reach only the reason of those sought to be influenced." *Trist* v. *Child,* 21 Wall. 441, 450. For such a case, the law in this Court is clear:

> It is legitimate to lay before the officers authorized to contract, all such information as may apprise them of the character and value of the articles offered, and enable them to act for the best interests of the country. And for such services compensation may be had as for similar services with private parties, either upon a *quantum meruit,* or, where a sale is effected, by the ordinary brokerage commission. And here it may be observed, in answer to some authorities cited, that the percentage allowed by established custom of commission merchants and brokers, though dependent upon sales made, is not regarded as contingent compensation in the obnoxious sense of that term, which has been

> so often the subject of animadversion by this court, as suggesting the use of sinister or corrupt means for accomplishing a desired end. They are the rates established by merchants for legitimate services in the regular course of business. (*Oscanyan* v. *Arms Co.*, 103 U. S. 261, 275-6).

Petitioner does not merely avoid illegality. He served well both the Government and his client. The officer in command of camouflage work at the Army Engineer Board, Fort Belvoir, testified to the merit of petitioner's ideas on camouflage and to the assistance given by petitioner (R. 79, 92). And petitioner was cited by the War Department for his work in the development of camouflage materials and equipment and his assistance in improving camouflage technique (R. 258). This Court his directed that in these cases "detriment to the public interest will not be presumed." *Steele* v. *Drummond*, 275 U. S. at 205. Here it may fairly be said that affirmative benefit to the public interest has been proven.

(3) The petition should be granted because the court below has for palpably inadequate reasons overturned the rule of public policy laid down by this Court and by state courts, including those of New York. The holding is, moreover, in direct conflict with decisions of the courts of New York, Missouri and North Dakota on the effect of the Executive Order. See pp. 12, 16, *supra*.

The petition should be granted, too, because of the urgency and importance of the question decided. We are again engaged in a great procurement effort in a time of declared national emergency. Proc. 2914, December 16, 1950, 15 F. R. 9029. As in so many other respects, the same conditions exist today with respect

to the question decided below as existed in December 1941. The First War Powers Act has just now been extended and on February 6, 1951 the President again exercised, by Executive Order No. 10211, the authority which he exercised in Executive Order No. 9001. P. L. 921, Jan. 12, 1951, 81st Cong., 2nd Sess.; Executive Order No. 10211, February 2, 1951, (Appendix, p. 32, *infra*).

The civilian side of the Government is making procurement contracts at the rate of 700,000 a year. The three military departments are operating at the rate of one and a half million "procurement actions" annually (not all contracts). In the case of every contract, the contractor will be required to disclose whether contingent fees have been paid or are payable. And in every such case disclosed, Government contracting and legal officers will have to decide the propriety of the contingent fee under the warranty clause required by Executive Order No. 10211 to be in the contract. Those officers have been proceeding on a case by case basis, considering all the facts and relying on the distinction made by this Court and the Congress between the "influence peddler" and the legitimate and useful representative of business. Hearing before Senate Investigations Subcommittee, Committee on Expenditures in the Executive Departments, March 14, 1951, pp. 4293, 4346, 4284-309, 4359 and *passim*. Since the warranty required by Executive Order No. 10211 is a substantial counterpart of that required by Executive Order No. 9001 (see n. 5, p. 15, *supra*), it is not too much to say that these Government officers will be thoroughly confused by the unqualified condemnation of contingent fee contracts which the court below professed to find in Executive Order No. 9001.

Perhaps even more important will be the effect of the decision below on the business community.[14] Despite the best effort of the Government to publicize its needs and to eliminate the middleman, small business needs qualified go-betweens in its dealings with Government procurement agencies. The time-honored custom of business, at least small business, is to pay only on a commission and contingent basis. The decision below condemns and stigmatizes this practice. If businessmen are thus deterred from hiring legitimate representatives to help them sell to the Government, they will inevitably make a smaller contribution to our industrial productivity.[15] Particularly will this be so in

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[14] The widespread interest in the question, in connection with the field of renegotiation alone, is suggested by the fact that the Prentice-Hall Government Contracts Service, on its first page explaining how the service should be used, uses this question as an illustration: "Example. Your company is interested in knowing if commissions paid to brokers or agents for the procurement or performance of war contracts are allowable as a cost on renegotiation."

[15] Mr. Jess Larson, General Services Administrator, recently said (Hearing before the Senate Investigations Subcommittee of the Committee on Expenditures in the Executive Departments, March 14, 1951, p. 4277):

> In my testimony before this Committee on September 1, 1949, I stated '. . . By far the great majority of the people engaged in this program (manufacturers' representatives) are honest, legitimate, hardworking and enterprising individuals who perform an honest service for their clients and who, in my opinion, more often than not perform a helpful service to the Government. Let us not, in the heat of condemning the unscrupulous operator, overlook the manner in which business is necessarily carried on and the valuable service that is sometimes performed by the various links in business transactions.'
>
> The shift from a peacetime economy toward mobilization more than ever re-emphasizes the importance of these words.

(Footnote continued on page 26)

connection with their employment of inventive technicians such as the petitioner to develop new uses for old materials. As a boy of nineteen in World War I, petitioner created the camouflaged sniper's suit (R. 21-22, 103). In World War II his ingenuity produced the inflated mock soldier, who with wonderful simplicity was dropped in numbers in the Pacific in one place when we were about to land at another (R. 26-7). Petitioner and others like him can find employment with business only on a commission and contingent basis. They and the businessmen whom they prod into producing the necessary samples for testing and standardization by the Government, will surely be deterred from joining together to develop new products for use in our present defense effort, if the decision below goes unreviewed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition should be granted.

SAUL J. LANCE,
GEORGE H. SCHWARTZ,
Counsel for Petitioner.

April, 1951.

(Footnote continued from preceding page)

Many small businessmen have found themselves handicapped in obtaining Government contracts because of their fear of being publicly condemned if they engage the services of a legitimate representative to bring their product to the attention of proper Government officials.

APPENDIX.

EXECUTIVE ORDER No. 9001, Dec. 27, 1941, 6 F. R. 6787, as amended by Executive Order No. 9296, Jan. 30, 1943, 8 F. R. 1429:

The successful prosecution of the war requires an all-out industrial mobilization of the United States in order that the materials necessary to win the war may be produced in the shortest possible time. To accomplish this objective it is necessary that the Departments of War and the Navy and the United States Maritime Commission cooperate to the fullest possible degree with the Office of Production Management in the endeavor to make available for the production of war material all the industrial resources of the Country. It is expected that in the exercise of the powers hereinafter granted, these Agencies and the Office of Production Management will work together to bring about the conversion of manufacturing industries to war production, including the surveying of the war potential of industries, plant by plant; the spreading of war orders; the conversion of facilities; the assurance of efficient and speedy production; the development and use of subcontracting to the fullest extent and the conservation of strategic materials.

TITLE I.

1. By virtue of the authority in me vested by the Act of Congress, entitled "An Act to expedite the prosecution of the War effort", approved December 18, 1941, (hereinafter called "the Act") and as President of the United States and Commander-in-Chief of the Army and Navy of the United States, and deeming that such action will facilitate the prosecution of the war, I do hereby

order that the War Department, the Navy Department, and the United States Maritime Commission be and they hereby respectively are authorized within the limits of the amounts appropriated therefor to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts. The authority herein conferred may be exercised by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission respectively or in their discretion and by their direction respectively may also be exercised through any other officer or officers or civilian officials of the War or the Navy Departments or the United States Maritime Commission. The Secretary of War, the Secretary of the Navy, or the United States Maritime Commission may confer upon any officer or officers of their respective departments, or civilian officials thereof, the power to make further delegations of such powers within the War and the Navy Departments, and the United States Maritime Commission.

2. The contracts hereby authorized to be made include agreements of all kinds (whether in the form of letters of intent, purchase orders, or otherwise) for all types and kinds of things and services necessary, appropriate or convenient for the prosecution of war, or for the invention, development, or production of, or research concerning any such things, including but not limited to, aircraft, buildings, vessels, arms, armament, equipment, or supplies of any kind, or any portion thereof, including plans, spare parts and equipment therefor, materials, supplies, facilities, utilities, machin-

ery, machine tools, and any other equipment, without any restriction of any kind, either as to type, character, location or form.

3. The War Department, the Navy Department, and the United States Maritime Commission may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any percentum of the contract price, and may enter into agreements with contractors and/or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the War Department, the Navy Department, or the United States Maritime Commission respectively the prosecution of the war is thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have been accomplished hereunder, irrespective of the time or circumstances of the making of or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract, or the amendments or modifications thereof.

4. Advertising, competitive bidding, and bid, payment, performance or other bonds or other forms of security, need not be required.

Title II.

Pursuant to Title II of the Act and for the protection of the interests of the United States, I do hereby prescribe the following regulations for the exercise of the authority herein conferred upon the

War Department, the Navy Department, and the United States Maritime Commission.

1. Complete data shall be maintained by the War Department, the Navy Department, and the United States Maritime Commission as to all contracts and purchases which they respectively make pursuant to the Act and this Executive Order. The Secretary of War, the Secretary of the Navy, and the Chairman of the United States Maritime Commission shall make available for public inspection, as they may respectively deem compatible with the public interest, so much of such data as does not cover restricted, confidential, or secret contracts or purchases.

2. Notwithstanding anything in the Act or this Executive Order the War Department, the Navy Department, and the United States Maritime Commission shall not discriminate in any act performed thereunder against any person on the ground of race, creed, color or national origin, and all contracts shall be deemed to incorporate by reference a provision that the contractor and any subcontractors thereunder shall not so discriminate.

3. No claim against the United States arising under any purchase or contract made under the authority of the Act shall be assigned except in accordance with the Assignment of Claims Act, 1940 (Public No. 811, 76th Congress, approved October 9, 1940) (section 203 of Title 31 and section 15 of Title 41).

4. Advance payments shall be made hereunder only after careful scrutiny to determine that such payments will promote the national interest and under such regulations to that end as the Secretary of War, the Secretary of the Navy, or the

United States Maritime Commission may prescribe.

5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

6. Nothing herein shall be construed to authorize the cost-plus-a-percentage-of-cost system of contracting.

7. Nothing herein shall be construed to authorize any contracts in violation of existing law relating to limitation of profits, or the payment of a fee in excess of such limitation as may be specifically set forth in the act appropriating the funds obligated by a contract. In the absence of such limitation, the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this Order shall not exceed seven per centum of the estimated cost of the contract (exclusive of the fee as determined by the Secretary of War, the Secretary of the Navy, or the United States Maritime Commission, as the case may be).

8. No contract or modification or amendment thereof shall be exempt from the provisions of the Walsh-Healey Act (49 Stat. 2036) (sections 35-45 of Title 41) because of being entered into without advertising or competitive bidding, and the provisions of such act, the Davis-Bacon Act, as amended (49 Stat. 1011) (sections 276a to 276a-5 of Title 40), the Copeland Act, as amended (48 Stat. 948) (sections 276b and 276c of Title 40), and the Eight Hour Law, as amended by the Act of September 9, 1940 (Public No. 781, 76th Congress) (sections 321 et seq. of Title 40) if otherwise applicable shall apply to contracts made and performed under the authority of this Order.

EXECUTIVE ORDER No. 10210, February 2, 1951, 16 F. R. 1049:

By virtue of the authority vested in me by the First War Powers Act, 1941, as amended by the act of January 12, 1951, entitled "An Act to amend and extend title II of the First War Powers Act, 1941" (Public Law 921, 81st Congress), hereinafter called the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

PART I.

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized, within the limits of the amounts appropriated and the contract authorization provided therefor, to enter into contracts and into amendments or modi-

fications of contracts heretofore or hereafter made and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

* * * *

10. Every contract entered into, amended, or modified pursuant to this order shall contain a warranty by the contractor in substantially the following terms:

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

* * * *

15. Nothing herein contained shall prejudice anything heretofore done under Executive Order No. 9001 of December 27, 1941, or any amendments or extensions thereof, or the continuance in force of an action heretofore taken under the said order or any amendments or extensions thereof.

16. Nothing herein contained shall prejudice any authority to utilize the provisions of the Armed Services Procurement Act of 1947 (62 Stat. 26) and regulations thereunder.

Sec. 4(a), ARMED SERVICES PROCUREMENT ACT OF 1947, 62 Stat. 21, 23, 41 U. S. C. (Supp. III), 153a:

Sec. 4.(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

Sec. 304(a), FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, P. L. 152, June 30, 1949, 81st Cong., 1st Sess., 41 U. S. C. (Supp. III) 254(a):

Sec. 304(a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 302(c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 302(c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or

secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

PUBLIC LAW 149, 78th Cong., 1st Sess., July 14, 1943, 57 Stat. 564, Sec. 1 (as amended, 50 U. S. C. App. Sec. 1191 (a)(5)), amended the first sentence of Section 403(a)(5) of the Sixth Supplemental National Defense Appropriation Act, 1942 (56 Stat. 982) to read as follows:

The term "subcontract" means (i) any purchase order or agreement to perform all or any part of the work, or to make or furnish any article, required for the performance of any other contract or subcontract or (ii) any contract or arrangement (other than a contract or arrangement between two contracting parties, one of which parties is found by the Secretary to be a bona fide executive officer, partner, or full-time employee of the other contracting party), (A) any amount payable under which is contingent upon the procurement of a contract or contracts with a Department or of a subcontract or subcontracts thereunder, or determined with reference to the amount of such a contract or subcontract or such contracts or subcontracts, or (B) under which any part of the services performed or to be performed consists of the soliciting, attempting to procure, or procuring a contract or contracts with a Department

or a subcontract or subcontracts thereunder: *Provided,* That nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions; or (2) to restrict in any way the authority of the Secretary to determine the nature or amount of selling expenses under subcontracts as defined in (ii) herein, as a proper element of the contract price or as a reimbursable item of cost, under a contract with a Department or a subcontract thereunder.

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 651

MELDON MITCHELL,
Petitioner,

against

THE FLINTKOTE COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM PIEL, JR.,
HENRY N. ESS, III,
48 Wall Street,
New York 5, N. Y.,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

MELDON MITCHELL, *Petitioner,* *against* THE FLINTKOTE COMPANY, *Respondent.*	No. 651

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

I.

Opinion Below

The opinion of the Court of Appeals is reported at 185 F. (2d) 1008. The District Court did not render an opinion.

II.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

III.

Statute and Executive Order Involved

The only Executive Order involved in this case is Executive Order 9001 (6 Fed. Reg. 6787) which was

promulgated pursuant to Title II of the First War Powers Act (55 Stat. 839, 50 U. S. C., App. § 611). Executive Order 9001 is no longer in effect.

IV.

Counter-statement of the Case

Petitioner's "Statement" (Petition, pp. 3-8) requires material correction and enlargement.

The District Judge charged the jury, without exception by petitioner, with respect to petitioner's claim as follows (R. 250):

> "As I understand the plaintiff, he says his version of this contract that he alleges was made on January 5, 1942 by telephone with Mr. Neher is that he was to be paid 3 per cent on the sales of any camouflage material sold by the defendant to the United States Government or any branch of it—the Army, Navy, or the Civilian Defense Department; that in consideration of that promise of reimbursement by the defendant he agreed to devote so much of his time as he thought it deserved to the finding out of the Government's wants in the camouflage field and promoting the defendant's reputation, which, it appears, boiled down to having its name added to the list of possible contractors."

The jury must therefore have found by its verdict that the contract between petitioner and respondent was entered into in the terms charged by the District Judge.

The only product which respondent sold to the United States Government for camouflage purposes was bituminous emulsion camouflage paint (P. Ex. 15, R. 278-282; R. 220). This paint is not an ordinary commercial paint

(R. 87). Its distinguishing features are that it is made from a cheap and readily available base material—asphalt—and is applicable to a wide variety of surfaces (R. 197).

Petitioner knew nothing about this product, and never discussed it with respondent's officials (R. 151). Petitioner never had a sample of this paint in his possession (R. 108); he never submitted any paint formulae to respondent (R. 108), and he never made any tests of respondent's product (R. 110). Petitioner did not draft any specifications relating to this paint (R. 110), and indeed he never read a specification that related to this product (R. 146-47).

All of the paint for camouflage purposes which respondent sold to the United States Government was sold to the War and Navy Departments (P. Ex. 15, R. 278-282). All the details in connection with such competitive bidding were handled by respondent's regular salesmen, who, in each case, prepared and submitted the bids (R. 215-16, 235-36).

Petitioner is not a salesman, even for his own business organization (R. 103). Petitioner's business is that of an artist for advertising materials (R. 21-25).

Petitioner never had office space in respondent's offices (R. 104). He made no written reports to respondent concerning his activities in Washington. Petitioner testified that he had heavy expenses but he never understood that respondent was to reimburse him for such expenses (R. 106).

Petitioner made much in his dealings with respondent of his "unique position in dealing with the Government on camouflage matters" (P. Ex. 7, R. 264, 267).

Finally, it should be noted that respondent's appeal to the Court of Appeals challenged the sufficiency of the evidence as to the making and performance of the contract claimed by petitioner (R. 418). The Court of Appeals expressly left those issues open (R. 419).[1] The Court of Appeals decided the case solely on the application of Executive Order 9001 to the contract found by the jury under the District Court's charge. It did not decide or pass upon the additional questions whether the contract as found by the jury was unenforceable under decisions of this Court (R. 421-22) or under a decision of that Court of Appeals dealing with contracts not involving federal functions (R. 422).

V.

Argument

A. Petitioner's position in this Court.

Petitioner's claim in this Court, briefly stated, is that Executive Order 9001 (6 Fed. Reg. 6787) is not a source of public policy to which the Court of Appeals could properly look in holding the contract as found by the jury void and unenforceable (Petition, p. 2, pp. 9-21). Petitioner apparently concedes that if Executive Order 9001 is a source of public policy to which the courts can properly look in determining the enforceability of the contract as found by the jury, his case falls to the ground.

Petitioner makes no claim in this Court that he comes within the exception afforded by Executive Order 9001 to "commissions payable by contractors upon contracts or

[1] If the writ is granted, respondent will argue these issues in additional support of the judgment of the Court of Appeals.

sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business". Nor did he assert this position in the Court of Appeals. Nor, as we shall show (pp. 20-21, *infra*), could he successfully assert it. Much of his argument, however, dwells upon matters which pertain only to the scope of this exception.

We shall demonstrate that the public policy set forth in Executive Order 9001 finds its origin in decisions of this Court; that Congress and the Executive Department have strongly indicated their full approval of that policy, and that the decisions of the state courts relied on by petitioner (Petition, p. 16; cf. p. 12) are not in conflict with the decision of the Court of Appeals.

B. Executive Order 9001 finds its origin in decisions of this Court.

The contract as found by the jury falls clearly under the decisions of this Court dealing with contingent-fee commission arrangements in connection with the purchase of supplies by the United States Government. Respondent contends that these decisions are in themselves sufficient to support the judgment of the Court of Appeals, and they are discussed here to show the sturdy roots of the public policy embodied in Executive Order 9001.

Since the Civil War no agent in the position of petitioner here has been permitted to recover on a contract for contingent-fee commissions on purchases by the United States Government. The vice of the agreement found here, indeed of all such agreements, is that petitioner's compensation is measured by the amount of the sales made and not by the value of the services performed. The fact that

the compensation is dependent upon the success of the venture is a tremendous inducement to the agent to take whatever steps are helpful to secure the desired object, including the use of improper influence upon public officials.

It would, of course, be simple to adopt the rule that only where an agent actually used improper influence in connection with a government contract should he be denied recovery upon a contingent compensation arrangement. But such a rule would ignore the realities of life, for where improper means are employed or improper influence is brought to bear upon public officials to secure government action, it is almost always well concealed. For this reason, this Court has not found it practical to draw any distinction between action upon contracts in the performance of which improper influence was used and those in which it was not.

In *Tool Co.* v. *Norris,* 2 Wall. 45 (1864), suit was brought upon a contingent-fee contract under which the plaintiff was to receive compensation if he succeeded in securing a government contract for the purchase of muskets to be used in the Civil War. This Court held in unequivocal language that the contract sued upon was void as against public policy (2 Wall. at p. 54):

> "* * * All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the Government * * *. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest * * *.

> "There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements * * *. (2 Wall. at p. 55)
>
> "* * *it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the Government * * * are void as against public policy *without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.*" (Italics supplied.) (2 Wall. at p. 56.)

This decision was followed in

> *Trist* v. *Child,* 21 Wall. 441 (1874);
> *Meguire* v. *Corwine,* 101 U. S. 108 (1879);
> *Hazelton* v. *Sheckells,* 202 U. S. 71 (1906); and
> *Crocker* v. *United States,* 240 U. S. 74 (1916).

Mr. Justice Holmes delivered the opinion of a unanimous court in *Hazelton* v. *Sheckells, supra,* reaffirming the rule of the *Norris* and *Trist* cases, and saying (202 U. S. at p. 78):

> "The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill they were legitimate. *We assume that they were legitimate,* but the validity of the contract depends on the nature of the original offer, and whatever their form the

tendency of such offers is the same. *The objection to them rests in their tendency, not in what was done in the particular case* * * *. *The court will not inquire what was done.* If that should be improper it probably would be hidden and would not appear. In its inception the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward * * *.

"The general principle was laid down broadly in *Tool Co.* v. *Norris,* 2 Wall. 45, 54, that an agreement for compensation to procure a contract from the Government to furnish its supplies could not be enforced *irrespective of the question whether improper means were contemplated or used for procuring it* * * *." (Italics supplied.)

The *Hazelton* case involved an agreement under which the plaintiff was to attempt to interest Congress in obtaining for the Government, through exercise of its power of eminent domain, certain property belonging to the defendant. If the plaintiff succeeded he would receive as contingent compensation everything which the Government should pay over a certain sum. The agreement was declared void.

Subsequently, in *Crocker* v. *United States,* 240 U. S. 74 (1916), this Court held that a contract providing for contingent compensation and directed at procuring a government order for letter carriers' satchels was void, quoting at length from the opinion in *Tool Co.* v. *Norris,* and also citing *inter alia* the *Trist* and *Meguire* cases.

A clause substantially similar to the warranty contained in Executive Order 9001 was added to government contracts as a direct result of the decision of this Court in the *Crocker* case. See Memorandum of Robert E. Kline,

Special Advisor to the Secretary of the Navy, Hearings before House Committee on Naval Affairs, 77th Cong., 2d Sess., pursuant to H. Res. 162, July 16, 1942, pp. 1185-90. As pointed out in Mr. Kline's memorandum, the warranty against contingent fees has been included in all government contracts since 1918. The purpose of the warranty was not only to embody in all government contracts the doctrine laid down by this Court in the *Crocker* case and its predecessors, so that all contractors with the Government would be on notice that contingent-fee arrangements were illegal, but also to give the Government definite rights in proceeding against contractors who violated the warranty.

The warranty contained in Executive Order 9001 is a reaffirmation by the Executive Department of the Government of its long established policy against contingent-fee arrangements of the kind found in the case at bar.

The fact that the Executive Department expressly accepted this Court's holding in the *Crocker* case and has continued to adhere to the policy therein expressed would render irrelevant petitioner's contention that the rule of the *Crocker* case and its predecessors has been modified. We shall show, however, that the rule of the *Crocker* case and its predecessors has not been modified but has been emphatically reaffirmed by this Court (*infra*, pp. 17-19).

The Courts of Appeals have found Executive Order 9001 to be an expression of public policy against contingent-fee arrangements in connection with contracts to which the United States Government is a party. *Reynolds* v. *Goodwin-Hill Corporation*, 154 F. (2d) 553 (C. A. 2d 1946); *Bradley* v. *American Radiator & Standard San. Corp.*, 159 F. (2d) 39 (C. A. 2d 1947) aff'g 6 F. R. D. 37 (S. D. N. Y.

1946); [2] see also *United States* v. *Paddock*, 178 F. (2d) 394 (C. A. 5th 1949), opinion on rehearing 180 F. (2d) 121 (C. A. 5th 1950), cert. denied, 340 U. S. 813.

In *American Seating Co.* v. *Zell*, 322 U. S. 709 (1944) this Court reversed a judgment of the Court of Appeals and reinstated a judgment of the District Court in favor of the defendant, four members of this Court finding the contingent-fee contract there involved unenforceable by reason of the statute of frauds, and three members of this Court finding the contract void and illegal by reason of the public policy contained in Executive Order 9001 and announced in the *Tool Co.* and *Hazelton* cases. The oral agreement regarding contingent compensation found unenforceable by this Court was kept secret, not as petitioner suggests (Petition, p. 10n), because the parties in fact contemplated that anything improper would be done, but because the parties were in doubt as to the legality of the oral arrangement. See 138 F. (2d) at p. 642. Indeed, it may be pointed out that in the *Zell* case, contact with officials of the United States was not within the contemplation of the parties at all. Recovery was sought in the *Zell* case for commissions earned on contracts which plaintiff obtained for defendant from prime contractors who in turn had contracts with the United States. See 138 F. (2d) at p. 642.

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[2] These decisions are erroneously characterized by petitioner (Petition, p. 16n). In both cases the Court of Appeals applied Executive Order 9001 as a source of public policy. In both cases more than a single government contract was envisaged under the contract passed on by the Court of Appeals. In the *Reynolds* case, the plaintiff obtained but one contract but testified that he attempted to secure several others. In the *Bradley* case, the complaint was dismissed for showing illegality on its face. Plaintiff alleged in his complaint that he succeeded in having defendant included in a list of manufacturers to whom invitations to bid on contracts were sent by the War Department. The complaint is set out in full in 6 F. R. D. 37, 38-39. It alleged that defendant obtained "orders" as a result of plaintiff's activities.

C. Congress has reaffirmed the public policy contained in the warranty clause of Executive Order 9001.

Petitioner seeks to draw from administrative and legislative sources the thought that Executive Order 9001 was not intended to embody a public policy against contingent-fee arrangements.

(1) Stress is laid upon H. R. 7304, 77th Cong., 2nd Sess. (Petition, pp. 17-18). That bill, if enacted, would have gone beyond Executive Order 9001 in three major respects. *First,* it would have made all contingent-fee arrangements illegal. It thus would have nullified the exception in favor of established salesmen contained in Executive Order 9001. *Second,* it would have imposed criminal penalties in connection with contingent-fee arrangements. This sanction was entirely new. *Third,* it would have applied, in its amended form, to all government departments. At the time, Executive Order 9001 applied only to the War and Navy Departments and the Maritime Commission.

The sponsors of the bill were fully aware of Executive Order 9001 and of the holdings of this Court that contracts of the kind found by the jury here could not be enforced by the agent (see 88 Cong. Rec. 6409, 6410, 6413, 6418). The sponsors of the bill, together with the War Department which fully approved it, favored the legislative repeal of the exception in favor of established salesmen maintained by the contractor which is contained in Executive Order 9001. *H. Rep. 2356, 77th Cong., 2d Sess.*

Since petitioner does not here claim that he is within the exception afforded by Executive Order 9001, and since in fact he could not on this record bring himself within it, this piece of legislative history can scarcely help him. It

shows no Congressional disagreement with the warranty clause of Executive Order 9001. On the contrary, it demonstrates that there was a substantial body of Congressional opinion which regarded Executive Order 9001 as entirely too lenient to deal with the situation created by the five-percenters.

(2) Petitioner also argues from Public Law 149, 78th Cong., 1st Sess., 57 Stat. 564 that in some way the public policy announced by Executive Order 9001 was modified. An examination of the statute and the legislative history behind the statute discloses that the contrary was the case.

First, the statute itself was carefully drawn so as to preserve in full vigor the warranty clause contained in Executive Order 9001. The proviso clause in the statute is explicit on this point:

> "*Provided,* that nothing in this sentence shall be construed (1) to affect in any way the validity or construction of provisions in any contract with a Department or any subcontract thereunder, heretofore at any time or hereafter made, prohibiting the payment of contingent fees or commissions * * *."

It is difficult to see how Congress could have chosen clearer language to express its intent that the warranty in Executive Order 9001 had its full approval.

Second, the legislative history of Public Law 149 discloses that Congress intended to supplement the policy expressed in the warranty clause of Executive Order 9001 in two ways. In the first place, the statute was intended to reach excessive earnings by those who fell within the exception clause of the warranty. And further, the legislation was intended to bring subcontractors within the reach of the renegotiation statute. See *H. Rep. 353, 78th Cong.,*

1st Sess.; Sen. Rep. 255, *78th Cong., 1st Sess.* The committee reports make it abundantly clear that Congress intended to preserve the warranty clause of Executive Order 9001 as an expression of public policy in full force and vigor.

(3) Recent affirmation by Congress of the public policy embodied in the warranty clause of Executive Order 9001 may be found in the statutes cited by petitioner (Petition, pp. 34-5). Both Section 4(a) of the Armed Services Procurement Act of 1947, 62 Stat. 21, 23, 41 U. S. C. (Supp. III) § 153(a),[3] and Section 304(a) of the Federal Property and Administration Services Act of 1949, Public Law 152, June 30, 1949, 81st Cong., 1st Sess., 41 U. S. C. (Supp. III) § 254(a) require the inclusion of a warranty in contracts entered into under those statutes in terms similar to that required in Executive Order 9001. In view of Congress' undoubted knowledge of the history and purpose of the warranty and its relation to the rulings of this Court on contracts violative of the warranty, this surely is striking evidence of the intent of Congress to maintain its rigorous public policy in condemning contracts of the kind presented by the case at bar.

(4) Petitioner also attempts to introduce the thought that administrative agencies have not regarded the warranty clause of Executive Order 9001 as embodying a public policy against contingent-fee arrangements.

However, examination of the cases relied on by petitioner discloses that they involved the question whether the

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[3]While this statute is addressed only to negotiated contracts, its effect is extended by administrative regulation to require inclusion of the warranty in advertised contracts as well. *Armed Services Procurement Regulation,* 7-103:20.

particular person came within the exception clause of the warranty.

Thus, in *North American Iron & Steel Company, Inc.* v. *Navy Department*, Office of Contract Settlement, Feb. 7, 1947, 4 C. C. F. ¶ 60,238, and in *Alloy Products Corporation*, Army Board of Contract Appeals, Oct. 1, 1947, 4 C. C. F. ¶ 60,389, and in an opinion by the Comptroller General, Op. No. B-26993, 22 Comp. Gen. 124, the question before the administrative agency was whether the person claiming the contingent fee was within the exception. In the first two cases, the administrative agency expressly followed the decision of the Court of Appeals in *Reynolds* v. *Goodwin-Hill Corporation*, 154 F. (2d) 553. In the third case the Comptroller General ruled that a licensed real estate broker who had carried on that business for a number of years before the War as a regular occupation came within the exception.

In *United States* v. *Buckley*, 49 F. Supp. 993 (D. C. D. C.) Judge Laws expressly found that the agent there under criminal prosecution came within the exception, stating (49 F. Supp. at p. 995): "Here the broker employed by the contractor was a commercial and a selling agent."

The present position of counsel for the Government may be illustrated by *United States* v. *Paddock*, 178 F. (2d) 394 (C. A. 5th 1949), opinion on rehearing, 180 F. (2d) 121 (C. A. 5th 1950), cert. denied, 340 U. S. 813. There the United States recovered judgment against a corporation which had employed a contingent-fee broker to obtain war contracts for moneys paid by the United States to the defendant representing fees the defendant in turn had paid the broker. The broker was a corporation organized solely for the purpose of soliciting war contracts; its sole com-

pensation was derived from contingent fees, and none of its expenses was paid by the defendant contractor. The Court of Appeals, in holding that the broker did not fall within the exception, said (180 F. (2d) at p. 122):

> "The purpose of this exception, as indicated by the use of the word 'maintained' was to allow contractors to continue the existence of something already in use, not to introduce a special method of securing government contracts. The idea ordinarily conveyed by the phrase 'to maintain' is not to provide or construct something new, but to preserve free from change a method of doing business to which the party has been accustomed."

These authorities in no way help petitioner. He does not claim that he is within the exception prescribed by the warranty clause. On this record such a contention is unavailable to him.

D. The decisions of the State Courts are not in conflict with the decision of the Court of Appeals in this case.

Petitioner contends that there are cases in the state courts contrary to the holding of the Court of Appeals here (Petition, p. 16; cf. p. 12). Examination of these authorities discloses that they are not in conflict with the holding of the court below.

In *Glass* v. *Swimaster Corporation,* 74 N. D. 282, 21 N. W. (2d) 468 (1946), the Supreme Court of North Dakota affirmed a holding by the trial court that a contract to procure a Navy contract on a 5% contingent fee was illegal and unenforceable. In so holding the Supreme Court of North Dakota expressly relied upon Executive Order 9001.

In *Ebeling* v. *Fred J. Swaine Mfg. Co.*, 357 Mo. 549, 209 S. W. (2d) 892 (1948), the Supreme Court of Missouri held valid a contract whereby the agent undertook to procure subcontracts for the defendant from prime contractors who in turn had contracts with the United States. The case did not involve commissions on contracts with the United States.

In *Leahy* v. *Brooklyn Waterfront Terminal Corp.*, 272 App. Div. 781, 69 N. Y. S. (2d) 596 (2d Dept. 1947), the Appellate Division, Second Department of the Supreme Court of New York erroneously held that New York law governed the legality of the contract in suit and under New York law the contract was valid and enforceable. The Court said that if federal law were applied, no different result was required under the facts of the case. This observation was *obiter dictum*, and there must be read in conjunction with the *Leahy* case, the advertent decision of the same court in *John O'Connor* v. *Hudson River Day Line*, 269 App. Div. 960, 58 N. Y. S. (2d) 175 (2d Dept., 1945), aff'd 296 N. Y. 501, 68 N. E. (2d) 450, where the court held that the contract there in suit was governed by federal law and was illegal and void under the decisions of this Court in *Hazelton* v. *Sheckels*, 202 U. S. 71; *U. S.* v. *Allegheny County*, 322 U. S. 174, 183; *American Seating Co.* v. *Zell*, 322 U. S. 709; and *Muschany* v. *United States*, 324 U. S. 49, 64.[4]

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[4] *Bradford* v. *Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N. Y. S. (2d) 448 (Sup. Ct.) held that New York law, not federal law, governed the legality of the contract there in suit. The court was careful to state that it was not considering the federal doctrine or the effect of an application of such doctrine. *Singer* v. *Bruner-Ritter, Inc.*, 180 Misc., 928, 42 N. Y. S. (2d) 881, aff'd 266 App. Div. 953, 44 N. Y. S. (2d) 589 (1st Dept.), leave to appeal denied, 266 App. Div. 993, 45 N. Y. S. (2d) 411 (1st Dept.), follows the *Bradford* case.

Weinstein v. *Palmer,* 226 Minn. 64, 32 N. W. (2d) 154 (1948) did not involve an application of Executive Order 9001, for that was a suit for a contingent-fee by an attorney in connection with his representation of his client in an OPA proceeding.

Nor did *Hall* v. *Anderson,* 18 Wash. (2d) 625, 140 P. (2d) 266 (1943) involve Executive Order 9001. The court there held that Washington law governed the validity of contract whereby an attorney was hired to render professional services on a contingent-fee basis.

As has already been pointed out, in *United States* v. *Buckley,* 49 F. Supp. 993, the question was whether the agent there under criminal prosecution came within the exception clause in Executive Order 9001.

E. The public policy announced by this Court in Tool Co. v. Norris, supra, is the rule of this Court today.

As recently as 1945, this Court has announced its adherence to the wise rule of public policy laid down by it in the *Tool Co., Hazelton* and *Crocker* cases. In *Muschany v. United States,* 324 U. S. 49, 64 (1945), this Court said: "Contingent fee contracts to secure government business for the employer of the recipient have been held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure." This Court carefully distinguished the situation before it—the Government's employment of an agent to contract on its behalf—from the situation presented in the case at bar. 324 U. S. at p. 65. See also *American Seating Co.* v. *Zell,* 322 U. S. 709 (1944).

The cases relied on by petitioner are in no way to the contrary (Petition, p. 9, 21-23).

Steele v. *Drummond,* 275 U. S. 199 (1927) involved a contract, one of the terms of which contemplated securing a franchise for a railroad from a Florida municipality. The suit was brought to recover moneys actually expended in the performance of the contract. No contract with the United States was involved; nor was a contingent fee present. A contingent-fee contract is, we submit, squarely within Mr. Justice Butler's dictum (275 U. S. at p. 206) regarding "other improper or corrupt means."

Valdes v. *Larrinaga,* 233 U. S. 705 (1914) involved a contract for professional services rendered by an engineer in preparation of plans and claims relating to riparian rights. The compensation sought to be recovered was stated as 10% of *net profits.* Mr. Justice Holmes specifically stated that the case was decided on the assumption that *Hazelton* v. *Sheckells,* 202 U. S. 71, and like decisions were good law, absent controlling authorities laid down by Porto Rico (233 U. S. at p. 709).

Winton v. *Amos,* 255 U. S. 373 (1921) was a suit by attorneys in quantum meruit for services rendered in recovering a fund for Indians from the United States. No contingent fees were involved; the measure of recovery was the value of the services legitimately rendered—an element lacking in the contingent-fee cases.

In *Oscanyan* v. *Arms Co.,* 103 U. S. 261 (1880) this Court held that a contract for contingent fees on sales made to the Turkish government was illegal and void. No contract with the United States Government was involved. The language used by this Court in *Tool Co.* v. *Norris,*

supra, was quoted by Mr. Justice Field with express approval (103 U. S. at pp. 273-4). In addition, it may be pointed out that the exception contained in the warranty clause of Executive Order 9001 may be grounded upon the language in the *Oscanyan* case with respect to compensation paid to "merchants for legitimate services in the regular course of business." Since petitioner is not within the exception, it is difficult to see how this language affords him any comfort.

Stanton v. *Embrey, Administrator,* 93 U. S. 548 (1876) involved a claim by an attorney for a contingent-fee for professional services rendered. This Court took occasion specifically to approve the rule laid down in the *Tool Co.* case (93 U. S. at p. 557), but it put to one side contracts involving the services of lawyers in preparing and arguing claims against the United States, on the ground that the two situations involved basically different considerations. It should be noted that while compensation was contingent, recovery was based on quantum meruit.

In sum, the rule laid down by the *Tool Co., Hazelton* and *Crocker* cases has not been modified in any way by this Court. These decisions represent the sound rule of public policy as indeed they did in 1865.

With this demonstration both of petitioner's principal arguments collapse. The warranty clause of Executive Order 9001 represents a public policy specifically approved by all the branches of the Government, by Congress, by the Executive and by this Court. Quite independently of Executive Order 9001 the decisions of this Court furnish ample basis for the determination of the Court of Appeals that the contract as found by the jury is void and unenforceable.

F. Petitioner is not within the exception clause of Executive Order 9001 relating to "bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business".

Neither in this Court nor in the Court below has petitioner asserted that he comes within the exception provided by Executive Order 9001 relating to established sales agencies. Petitioner has consistently maintained the position that Executive Order 9001 has no application to this case.

It is apparent that petitioner's argument in this Court proceeds upon the inarticulate premise that petitioner is entitled to the benefits of the exception—even though he makes no showing that he falls within it.

The Court of Appeals for the Second Circuit has pointed out in two cases that the exception clause is an Executive relaxation of the rule announced by this Court in the *Tool Co.* case and the cases which follow that case. *Reynolds* v. *Goodwin-Hill Corporation,* 154 F. (2d) 553 (C. C. A. 2d, 1946); *Bradley* v. *American Radiator & Standard San.* Corp., 159 F. (2d) 39 (C. A. 2d, 1947). As the Court of Appeals said in the *Bradley* case (159 F. (2d) at pp. 40-1):

> "The exception creates a privileged class who may receive contingent fees for securing government contracts, while others may not. Not only should grants of special privileges be jealously restricted, but such a restriction is also in the interest of maintaining the integrity of governmental contracting procedure."

Under the rules adopted by the administrative agencies charged with the enforcement of the warranty clause in Executive Order 9001, petitioner clearly fails to bring himself within the exception. As reported by the Admin-

istrative agencies to Congress, a person to qualify within the exception had to meet three tests. *First,* such person must have had a continuity of service going well back before the war. *Second,* such person must have represented his principal in selling to commercial firms as well as to the Government. *Third,* such person must have been employed because of his familiarity with the product sold, not because of his knowledge of government procedure or acquaintance with government officials. See *H. Rep. 353, 78th Cong., 2d. Sess.,* pp. 5-6. Petitioner fails to meet all three of these tests.

Petitioner is not a salesman—not even for his own organization (R. 103). Nor was his own business organization a sales organization (R. 21, 25). Petitioner was not therefore a commercial or selling agency for the purpose of securing business.

Petitioner's claim dates from January 5, 1942. He bore all of his own expenses, and petitioner does not claim here reimbursement for expenses (R. 106). His relationship with respondent smacked wholly of a wartime character, and his compensation was to be wholly contingent.

Petitioner had no knowledge of the product that respondent furnished to the United States (R. 151, 108, 110, 146-47). All of his claimed performance took place in Washington making contact with government officials.

C. Reasons for Denying the Writ.

The Court of Appeals correctly applied Executive Order 9001 to the contract found by the jury under the District Court's charge. Executive Order 9001 is but one application by the Executive Department of a rule of public policy

that finds its roots in the decisions of this Court which go back to the Civil War. No conflict with decisions of this Court or of the state courts has been demonstrated; no conflict of decisions in the Courts of Appeals is asserted.

Executive Order 9001 is no longer in effect. The case at bar related solely to the relationship of the parties during World War II. No other question is presented.

The writ should be denied.

Respectfully submitted,

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